

1891
 Nov. 28.

SÉRAPHIN MORIN.....CLAIMANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Government railway—Damage to farm from overflow of water—Obligation to maintain boundary ditches.

The crown is under no obligation to repair or keep open the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec.

THIS was a claim for damages for the flooding of certain farm land in the County of Montmagny, P.Q., alleged to have arisen from the improper maintenance of the ditches and water-courses of the Intercolonial Railway and the claimant's boundary ditches.

By consent of parties the case was determined upon the evidence taken in the case of *Simoneau v. The Queen* (1).

The facts of this case are substantially the same as in *Simoneau's Case*, with the exception of a certain clause in the deed of sale from the claimant's *auteur* to the Grand Trunk Railway Company, which is cited at length in the reasons for judgment (2).

October, 22nd, 1891.

Choquette, for the claimant, contended that the damage complained of was clearly one for which the crown was liable. In addition to the flooding of the claimant's farm, a crossing given him by the Grand Trunk Railway Company, the crown's grantors, has been made impassable at certain seasons by the quantity of water that covers it. (Cited Art. 1053, C.C.L.C.). He also

(1) See the facts of that case as reasons for judgment. *Ante p.* 392. stated by the learned judge in his (2) *Post p.* 398.

dealt with the question of prescription as set up by the defence, and cited Art. 2242 C.C.L.C.

Belcourt, following on the same side :

1st. The acquittance given to the Grand Trunk Railway Company did not cover the *gravamen* of this action. The general rule under which incidental, or prospective or contemplated, damages are presumed to have been taken into consideration in the compensation paid to the owner at the time of the expropriation is not applicable to cases arising in the Province of Quebec. (Cites *Cantin v. The North Shore Railway Co.* (1); *Corporation de Tingwick v. Grand Trunk Railway* (2); *Grand Trunk Railway v. Meegar* (3); *Grand Trunk Railway v. Miville* (4); *Grand Trunk Railway v. Landry* (5); *Canadian Pacific Railway v. Pichette* (6); *de Bellefeuille's Code Civil Annoté* (7). It is the *lex loci* that governs in such cases as this. (Cites *Redfield on Railways* (8); *Story on Conflict of Laws* (9). These damages could not have been contemplated, because for five or six years the railway ditches were sufficient to carry off the water. The mischief arose when the ditches were allowed to fill up.

2ndly. The crown is liable for the acts and omissions of its grantor. (Cites *de Bellefeuille's Code Civil Annoté* (10); *Leduc v. The City of Montreal* (11).

3rdly. The crown had the right to go on claimant's lands and repair the ditches thereon or make new ones, and if this had been done the injury would have been removed.

4thly. As to respondent's contention that the claim is prescribed, it is submitted that the damage is con-

(1) Ram. App. Cas. 591.

(2) 3 Q. L. R. 111.

(3) 29 L.C. J. 214.

(4) 14 L. C. R. 469.

(5) 11 R. L. 590.

(6) 31 L. C. J. 36.

(7) Art. 1053, No. 104.

(8) Sec. 204, p. 303.

(9) Secs. 76 & 272.

(10) Art. 1053.

(11) 1 M. L. R. (S.C.) 300.

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tinuous, and, moreover, the crown has waived prescription by offering to make ditches some two years ago. (Cites *Grenier v. The City of Montreal* (1); *Renaud v. The City of Quebec* (2); *R.S.C. c. 109, s. 27*).

Argument
 of Counsel.

Hogg, Q. C. for the respondent : The consideration mentioned in the claimant's deed to the Grand Trunk Railway Company was in full of the damages claimed herein.

2ndly. The evidence in *Simoneau's Case* (3) shows that the crown has properly maintained the ditches on the railway.

Angers, Q. C. followed for respondent :

Under the deed the crown is not bound to keep the water-courses in question in repair ; and, moreover, it is therein expressly provided that the said water-courses shall be regulated by the provisions of the *Municipal Code of the Province of Quebec* (4).

BURBIDGE, J. now (November 28th, 1891) delivered judgment.

The claimant claims damages for the flooding of a portion of his farm adjoining the Intercolonial Railway in the County of Montmagny and Province of Quebec. The case does not differ from that of *Simoneau v. The Queen* (3) decided in this court in February, 1890, except in respect of the amount of damages claimed, and that the deed of sale, under which the right of way was originally acquired by the Grand Trunk Railway Company, contains the following clause which was not contained in the deed relied upon in *Simoneau's Case* :—

“ Cette vente faite * * * à la charge par la dite
 “ Compagnie de fournir au dit vendeur à travers le dit

(1) 3 L. N. 51.

(2) 8 Q.L.R. 102.

(3) *Ante* p. 391.

(4) Cites Arts. 867 & 871.

“ chemin, sur la dite terre, un passage convenable pour
 “ communiquer d’une partie à l’autre de la dite terre
 “ à son besoin et en toutes saisons et d’entretenir le
 “ dit passage ainsi que tous les cours d’eau qui pour-
 “ ront s’y rencontrer, et sera sujette à tous les règle-
 “ ments municipaux, relativement à iceux.”

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By agreement between the parties, this case is, with the exception I have mentioned, to be determined by the evidence taken in *Simoneau's Case*. In that case I observed that the deed of sale did not contain any covenant on the part of the company to keep open and in good order the ditches and water-courses on each side of the railway track, and the culverts communicating from one side of the track to the other. But I made the observation incidentally and because the claimant appeared to rely upon there being some such express covenant in the deed. I took care, however, to preface my brief allusion to that aspect of the case by stating that the absence of such a covenant was not a consideration material to the determination of the case. I am of the same opinion still.

It is not, under the evidence upon which that case and this depend, necessary to determine whether or not the crown, or its officers, are under any duty or obligation to keep open the railway ditches and culverts, for neglect or breach of which the injured proprietor would have a remedy in this court. The railway authorities, whatever their exact legal position may be, accept that obligation and duty and say that since the portion of the Intercolonial Railway that crosses the claimant's farm came into the possession of the crown the railway ditches and culverts have been maintained in good order and condition. The flooding of the lands of the adjoining proprietors, that takes place there, is not occasioned by any defect or want of repair in the railway ditches or culverts, but happens

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because such proprietors have not kept their own ditches open and in good repair. That was the finding of the registrar of this court in *Simoneau's Case*, and he had the advantage not only of hearing the evidence but of viewing the *locus*, and seeing, with his own eyes, how the matter stood. I am satisfied as well that the conclusion to which he came is not only justified by the evidence, but the only conclusion that could be reasonably come to. For five or six years after the railway was constructed there was no flooding of the lands in question; but, subsequently, the proprietors having neglected their boundary ditches, the water that collected at the sides of the railway had no way of escape, and their lands were in consequence drowned. Mr. Choquette, for the claimant, said that he would be satisfied with a judgment that established the liability of the crown to keep open the ditches on each side of the railway, and to maintain sufficient culverts to drain the lands south of the railway. But it seems to me that the real controversy between the parties goes beyond that. What the proprietors really want is that the Minister of Railways shall keep their boundary ditches in order for them. That contention cannot, I think, be supported.

By the 68th section of the Imperial *Railway Clauses Act*, 1845, it was, among other things, enacted that the company should make, and at all time thereafter maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, all necessary arches, tunnels, culverts, drains or other passages, either over or under or by the sides of the railway, of such dimensions as would be sufficient at all times to carry the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as might be; and that such works should be made from time to time as the railway works proceeded.

But while railway companies in Canada have power to make such works (1), they are not, as Mr. Justice Meredith pointed out in *The Grand Trunk Railway Co. v. Miville* (2), compelled by the statute to make them. No doubt if a railway company in Canada does not use or exercise its powers in such a way as to drain the lands through which its railway runs as effectually as they had been drained by the old water-courses before the construction of the railway, it must make compensation or pay damages (3). Where, as in *Simoneau's Case* (4) and this, the claimants' lands lie in a hollow and are crossed by a railway, the result must be that the railway ditches will collect water upon the adjacent slopes and discharge it upon such lands. It may happen, however, as in this case, that there will be no flooding or drowning of the lands so long as the proprietors keep their boundary ditches open. But more water will of necessity flow through such ditches than before the construction of the railway and so far as this is an injury to the proprietor, or throws upon him any additional burden, he is entitled to compensation. Such an injury is, however, one that may, it appears to me, be foreseen at the time the railway is constructed, and must, I think, be taken to be covered by an acquittance, such as was given in this case, of all damages resulting from such construction. But anyway that is a question which does not arise between the claimant and the crown. As I stated in *Simoneau's Case* (4), the mischief complained of had made itself manifest many years before the crown purchased from The Grand Trunk Railway Company the portion of the railway referred to, and since the purchase nothing has been done or

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(1) *The Railway Act*, 51 Vic. c. 29, s. 90; See also *The Expropriation Act*, 52 Vic. c. 13, ss. 3 & 4.

(2) 14 L. C. R. 480.

(3) *The Grand Trunk Railway Co. v. Miville*, 14 L. C. R. 469; and *The Canadian Pacific Railway Co. v. Pichette*, 31 L. C. J. 36.

(4) *Ante*, p. 391.

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omitted on the crown's part to alter the position of the matter or to give rise to the claim put forward.

The railway ditches and culverts have been kept in good order and repair, and the crown not being bound to repair the boundary ditches between the properties adjoining the railway, the claimant's case fails.

Judgment for respondent with costs.

Solicitor for claimant: *P. A. Choquette.*

Solicitors for respondent: *O'Connor, Hogg and Balderson.*